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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. BRYAN SCOTT COOK, Defendant and Appellant.	C082645 (Super. Ct. No. STKCR20140004509, SF126607A)

A jury found defendant Bryan Scott Cook guilty of second degree murder for fatally stabbing the victim. At trial, defendant maintained that he had been caring for the victim—his friend of several decades, who was in poor health—when the victim twice stabbed himself, which led to defendant, "[w]ithout thinking," stabbing the victim four more times. On appeal, defendant contends the trial court erred in refusing to instruct the jury on voluntary manslaughter as a lesser included offense of murder. He argues substantial evidence obligated the instruction. We agree and will reverse.

I. BACKGROUND

In considering defendant's challenge, we present defendant's version of the events. (See *People v. Cleaves* (1991) 229 Cal.App.3d 367, 371-372 (*Cleaves*) ["A defendant's right to instructions does not turn on the court's assessment of credibility or the strength of the evidence"]; *People v. Logan* (1917) 175 Cal. 45, 46 (*Logan*) [defendant's statement offered to lessen his culpability is not to be regarded as the court's view on the weight to be given to the evidence].)

At trial, defendant testified he had met Mike (the victim), 10 years his senior, two decades ago. Defendant looked up to him. They were friends, and together they did a lot of methamphetamine.[1]

At one point, a close friend of theirs was diagnosed with cancer and died six months later. Defendant called it an "agonizing, brutal experience." Mike and defendant agreed if they were ever like that, the other would not let them suffer like that. Defendant would, however, later clarify there was no agreement that one would actually kill the other.

In 2011, the victim was diagnosed with diabetes and suffered an infection around his spine. By late 2013, he was rendered housebound.

Around Christmas 2013, defendant learned the victim was trying to contact him. Defendant went to visit him in the hospital. The victim had developed a large abscess from injecting heroin into a muscle. Defendant would visit him three to four times a day in the hospital.

When the victim was discharged, on December 28th, defendant took care of him, which included packing his abscess. At one point, the victim called for defendant, saying

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[1] Leading up to the killing, defendant had been using methamphetamine daily, including several times the day of the killing.

" '[s]omething burst in my leg, Homeboy, something burst.' " Defendant saw yellowish-green colored pus. Defendant urged Mike to go back to the hospital, but he refused.

The victim was also having problems making it to the bathroom, and several times he soiled himself.

On December 31st, the victim's roomate yelled: "Something's wrong with Mike." Defendant described the victim as pale and talking gibberish. Defendant thought he had taken too many pills.

Late that night, defendant was changing the victim's bandage. At one point, the victim woke up and was conscious, though not communicating. While defendant was at the medical table, he saw the victim reach for a knife and fall out of bed. Thinking the victim would try to stab himself, defendant threw the knife out of reach.

Several hours later, the victim soiled himself on the bed. When defendant cleaned him, he used a knife to cut the plastic sheeting used to protect the mattress. When defendant turned away to move the sheets and change gloves, he heard a "smack noise." He turned to see the victim, now holding the knife, had stabbed himself twice. The victim was not wearing a shirt, and defendant could see two stab wounds and the knife on the bed. Defendant said, "No, Homeboy, no."

Defendant then picked up the knife and stabbed the victim four more times, to "[e]ase his suffering." When asked what he was thinking, he testified, "I wasn't." "I didn't decide anything. I just seen him, he stabbed himself and I followed suit. [¶] . . . [¶] Without thinking."

On cross, defendant agreed, he had aimed for the heart knowing it was a vital organ and knowing it would kill him, which was his intention. Though he explained, "I didn't make a decision. I didn't think. I just acted." When asked if it was instinct, he responded, "I don't know—I suppose." He was asked, "so did you think that when you stabbed [Mike] that you were fulfilling some type of vague agreement that you made 10, 15 years ago?" He answered, "No, I did not—I didn't think. I just acted."

According to defendant, after realizing what he had done, he panicked. To get the victim out of the house, he drained the victim's blood and dismembered the body. He later set fire to much of the remains.

A county medical examiner testified as an expert for the prosecution. The expert explained the victim's brain showed evidence of high toxic chemical injury before the stabbing. The victim had consumed drugs including Benadryl, Diphenhydramine, amphetamines, methamphetamine, morphine, and Oxycodone. For at least one to three hours, his brain was deprived of oxygen from some type of chemical injury. The victim "was maybe lying subconscious or conscious in bed but was still alive." He "could have been [in] a confusional state. You ask him a question, he's just staring at you looking dazed," and not giving appropriate responses. But he was alive when stabbed and ultimately died of the stab wounds.

At trial, defense counsel asked for a jury instruction on voluntary manslaughter (CALCRIM No. 570), arguing defendant was provoked and acted under the influence of intense emotion obscuring reason and judgment. He noted defendant had testified that his best friend of 20 years, who he was caring for, took a knife and stabbed himself. He added, the passion need not involve anger, only that defendant act under the influence of intense emotion that obscures reasoning or judgment.

The trial court denied the request, finding the element of provocation had not been met. It noted, there must be provocation brought on by the victim's conduct, and the voluntary manslaughter instruction cannot be given for a mercy killing.

The jury found defendant guilty of second degree murder (Pen. Code, § 187)[2] and found he had personally used a deadly weapon. The trial court imposed an aggregate term of 16 years to life.

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[2] Undesignated statutory references are to the Penal Code.

II. DISCUSSION

On appeal, defendant challenges the trial court's refusal to instruct on voluntary manslaughter as a lesser included offense. He argues the instruction was obligated by substantial evidence. He points to his close relationship to the long-suffering victim and seeing the victim with a knife in his chest. On these unusual facts, we agree.

Voluntary manslaughter is an unlawful killing without malice upon a sudden quarrel or "heat of passion." (§ 192, subd. (a).) Heat of passion is caused by "legally sufficient provocation," which causes a person to act "out of unconsidered reaction to the provocation." (*People v. Beltran* (2013) 56 Cal.4th 935, 942 (*Beltran*).) Heat of passion arises if defendant's reason was " ' "obscured or disturbed by passion" ' " such that a reasonable person of average disposition would " ' "act rashly and without deliberation and reflection." ' " (*Ibid*.) The anger or passion must be strong enough to bypass a defendant's thought process such that judgment could not intervene. (*Id*. at p. 949.) It is not enough that the provocation merely affects the quality of one's thought processes—it must eclipse reflection. (*Id*. at p. 950.)

A court need not instruct on involuntary manslaughter as a lesser included offense unless substantial evidence supports the instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 587-588.) " ' " ' Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' " ' " (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) "Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the defendant." (*Cleaves, supra*, 229 Cal.App.3d at p. 372.)

Here, substantial evidence supported the instruction. Defendant testified the victim, whom he had cared for and with whom he had a close relationship for 20 years, suddenly stabbed himself twice in the chest. Accepting, as we must, defendant's telling (see *Cleaves, supra,* 229 Cal.App.3d at p. 372) we cannot say that no ordinary reasonable person of average disposition would act rashly or without deliberation upon finding a

close friend in their care had stabbed himself. Such an event could reasonably eclipse reflection. That is not to say the shock of a close friend's suicide attempt would drive an ordinary person to kill— but that is not the test. The test is would a person of average disposition act " ' "rashly and without deliberation and reflection." ' " (*Beltran, supra,* 56 Cal.4th at p. 942.)

The People, however, point to defendant's testimony that he stabbed the victim to "[e]ase his suffering," that he aimed for the heart knowing it was a vital organ, and that he intended to kill the victim. Such testimony, the People reason, indicates defendant was not acting under provocation but under considered reflection. But defendant also testified, "I didn't think. I just acted"; "I didn't decide anything. I just seen him, he stabbed himself and I followed suit. [¶] . . . [¶] Without thinking." It is for the jury to resolve such contradictions. (See *Beltran, supra,* 56 Cal.4th at pp. 950-951 [The jury decides whether, under the circumstances, the act would naturally tend to arouse the passion of the ordinarily reasonable man]; *Logan, supra,* 175 Cal. at pp. 48-49 ["it is left to the jurors to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did . . . commit his offense under a heat of passion"].)

The People also point to expert testimony that the victim was suffering an incapacitating chemical injury when he supposedly stabbed himself and argue the defendant's self-serving testimony accordingly carries little if any weight. But the expert testimony allowed that the victim could have been in a conscious or confused state before his death. That testimony is not necessarily inconsistent with defendant's testimony that the victim's roomate discovered the victim was pale and talking gibberish, and later that night the victim woke and was conscious. (Cf. *People v. Thomas* (2013) 218 Cal.App.4th 630, 645 (*Thomas*) [that defendant's testimony was self-serving did not obviate the need for the CALCRIM No. 570 instruction].)

Finally, the error requires reversal. "Failure to instruct the jury on heat of passion to negate malice is federal constitutional error requiring analysis for prejudice under *Chapman*[*v. California* (1967) 386 U.S. 18]." (*Thomas, supra,* 218 Cal.App.4th at p. 644.) Here, we cannot say beyond a reasonable doubt the failure to instruct on voluntary manslaughter did not affect the outcome. We note, the jury found defendant guilty of murder in the second degree—rejecting a first degree finding.

III. DISPOSITION

The conviction for second degree murder is reversed. The People have 60 days from issuance of remittitur to determine whether to retry defendant. If the People fail to refile charges in that period, the judgment shall be modified to reflect a conviction for voluntary manslaughter and the trial court shall resentence defendant accordingly. (*People v. Kelly* (1992) 1 Cal.4th 495, 528 ["When a greater offense must be reversed, but a lesser included offense could be affirmed, we give the prosecutor the option of retrying the greater offense, or accepting a reduction to the lesser offense"].)

/S/

RENNER, J.

We concur:

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BUTZ, Acting P. J.

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HOCH, J.